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IN THE

Supreme Court of the United States

October Term, 1954.

No. 153.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

against

DREXEL AND COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

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QUESTIONS PRESENTED.

In a voluntary reorganization of a registered holding company under Section 11(e) of the Public Utility Holding Company Act of 1935 where no receiver or trustee is appointed, does the Securities and Exchange Commission have jurisdiction over a fee paid by a stockholder-parent of the reorganized company to the stockholder's own financial adviser out of its own funds, the funds of the reorganized company not being involved?

The Court of Appeals for the Second Circuit (per Chase, Chief Judge, and Swan and Medina, Circuit Judges) has given a unanimous negative answer to this question (R. 305),[1] and this Court has granted a writ of certiorari on the petition of the Securities and Exchange Commission (the "Commission") to review that decision (R. 341).

1. All references (R.) are to the page of the printed Transcript of Record.

The question is essentially a narrow, technical one of the proper construction of the Public Utility Holding Company Act of 1935 (49 STAT. 803 *et seq.* (1935), 15 U. S. C. § 79 (1952) (the "Act")) and primarily of two brief phrases contained in Section 11 thereof. Those phrases and the questions concerning them which arise in this case are:

> Does Section 11(e),[2] in requiring that the Commission approve a voluntary reorganization plan submitted by a registered holding company only if "fair and equitable to the persons affected by such plan", grant the Commission jurisdiction to regulate fees paid to the financial consultant of a stockholder-parent, *not* out of the funds of the reorganized company which is the subject of the plan, but out of the funds of the stockholder-parent itself, which is not a party to the plan?
>
> Does Section 11(f),[2] relating exclusively to receivership and trustee proceedings, in referring to fees "in any such proceeding", give the Commission jurisdiction over a fee of the type described above in a Section 11(e) proceeding where no trustee or receiver is appointed?

The question of policy is presented whether the Commission should be permitted to imply from the enumerated powers the Act does give it, additional powers which the Congress struck from the bill prior to its passage. In other words, are the powers of the Commission all-inclusive in relation to what the investor in a "reorganized" company can do with his own assets?

There can be no question of impairing the Commission's capacity to carry out the integration and simplification mandate of Section 11. For one thing, the question of such a fee as the one involved here is at most peripheral. In any event, the reorganization of the industry in accord-

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2 Excerpts appear in footnotes on pp. 9 and 10-11, respectively, and full text in Appendix A hereto.

ance with the requirements of Section 11 has now been virtually accomplished and the Commission's responsibilities therefor are practically at an end.

On January 11, 1954, the chairman of the Commission, Ralph H. Demmler, testified before a committee of the Congress that, aside from fee applications, "the reorganization and simplification proceedings under section 11 of the Holding Company Act now are substantially completed." HEARINGS BEFORE SUBCOMMITTEE OF COMMITTEE ON APPROPRIATIONS OF THE HOUSE OF REPRESENTATIVES, 83rd Cong., 2d Sess., Part 1, p. 228 (1954).

STATEMENT OF THE CASE.

The reorganization proceeding here involved is solely that of Electric Power & Light Corporation ("Electric"), a registered holding company and a statutory subsidiary of Electric Bond and Share Company ("Bond & Share"). Electric alone filed the voluntary reorganization plan approved under Section 11(e) of the Act (R. 4a). The instant proceeding is not, and could not legally be, a proceeding for the reorganization of Bond & Share, the statutory parent of Electric, or for the reorganization of any other subsidiary of Bond & Share.[3] Other proceedings in which Bond & Share and its other subsidiaries progressed toward compliance with Section 11 have no relevance to this case.

Following the affirmance by the Court of Appeals of the Commission's order under Section 11(b)(2) of the Act

3. Electric could not submit a plan under Section 11(e) for the reorganization of its parent, Bond & Share, or for any "sister" company. The section permits any registered holding company or any subsidiary company to submit a plan for the divestment of control, securities, or other assets, or for other action "*by such company or any subsidiary company thereof*" for the purpose of enabling "*such company or any subsidiary company thereof*" to comply with the provisions of subsection (b). (Italics supplied.) Electric could and did file a plan only for the purpose of enabling *Electric and its subsidiaries* to comply with Section 11(b).

that Electric must be dissolved (11 SEC 1146, H.C.A. Rel. No. 3750[4] (1942), *aff'd* 141 F. 2d 656 (1st Cir. 1944), *aff'd* 329 U. S. 90 (1946)), Bond & Share in May, 1945, retained Drexel & Co. ("Drexel"), an investment banking firm with extensive knowledge and experience in financial matters, to advise it in the protection of its investment in the reorganization of Electric.

In this capacity Drexel rendered professional services of great value to Bond & Share, which continued until the many conflicting proposals for the dissolution of Electric had been developed into the plan which was ultimately consummated, a period of more than three years (R. 61a-116a).

There were four principal plans presented for compliance by Electric with the 1942 order of the Commission. Each of these plans pertained only to the reorganization of Electric, and was submitted between 1945 and 1948 as follows: the first by Electric (R. 70a), the second by Bond & Share (R. 321), the third by both companies jointly (R. 324), and the fourth and final plan by Electric alone (R. 4a).

There were substantial disagreements between Bond & Share, the parent, and Electric, the subsidiary, as to the terms and provisions of the first two plans. (R. 68a, 69a-70a, 110a, 206a, 207a). The fourth plan (the "Plan"), which was finally consummated, was filed by Electric on March 25, 1948. (R. 4a).

Briefly, the Plan provided for the transfer by Electric to a new holding company of certain cash and of its securities in electric subsidiaries, the retirement of the preferred stocks of Electric through an exchange for common stocks of United Gas Corporation and of the new holding company, a cash settlement of certain claims against Bond & Share and the dissolution of Electric.

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4. Releases issued by the Commission under the Public Utility Holding Company Act of 1935 are herein referred to as "H.C.A. Rel. No. ——."

Bond & Share was not a party to the Plan. It did not submit the Plan. It was not and could not be the subject of the Plan.

The Plan, as later amended in certain particulars required by the Commission (see R. 34a, H. C. A. Rel. No. 8889, March 2, 1949), was approved by the Commission on March 7, 1949 (R. 36a).

On application of the Commission, the District Court on April 22, 1949 entered an order enforcing the Plan (R. 41a). The Court of Appeals for the Second Circuit affirmed on August 27, 1949 (In re *Electric Power & Light Corporation*, 176 F. 2d 687). The Plan was thereupon consummated.

In the course of the proceedings before the Commission, Bond & Share filed an Application-Declaration (R. 330), dated March 31, 1948, referring to Sections 10, 11, 12(c) and 12(f) of the Act, in connection with certain of its own transactions resulting from consummation of the Electric Plan.

The Commission's order of March 7, 1949, approving the Plan, did not purport to reserve jurisdiction over fees and expenses incurred by Bond & Share in connection with its Application-Declaration (R. 39a).

The only reservation of jurisdiction as to fees appearing in the order is as a condition to the granting of Electric's application for approval of its Plan.

With respect to this Plan, which had been submitted by Electric and to which Electric was the only party, the Commission's order read in pertinent part as follows:

> "It Is Ordered on the basis of the record herein and the said Findings and Opinion, pursuant to Section 11(e) of the Act and other applicable provisions of the Act, that the said Plan, as amended, be and it hereby is approved subject to the terms and conditions contained in Rule U-24 and to the following additional terms and conditions:
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> • • • •

"2. That jurisdiction be and hereby is specifically reserved to determine the reasonableness and appropriate allocation of all fees and expenses and other remuneration incurred or to be incurred in connection with the said Plan, as amended, and the transactions incident thereto . . .;" (R. 38a).

There were also other conditions to the approval of the Plan, but there were no conditions to the part of the order granting and permitting to become effective the Application-Declaration of Bond & Share (R. 39a).[5] In a separate paragraph the Commission's order simply stated:

"It is Further Ordered that the Application-Declaration of Bond & Share referred to above be and it hereby is granted and permitted to become effective."

In an amendment to the Plan made at the insistence of the Commission (R. 270a-271a), Electric had, *inter alia*, agreed to pay such fees and expenses of participants in the proceedings as the Commission should allow (R. 271a). But no such agreement was requested of the parent Bond & Share, and it made none.[6]

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5. Rule U-24 contains certain general reservations of jurisdiction with respect to Applications under the Act, but none of these general reservations relates to fees. Under Section 10(b)(2) of the Act the Commission is *required* to approve an acquisition *unless* it finds, among other things, that fees are not reasonable. There is no grant of jurisdiction over fees except as findings are made at the time of approval or disapproval of the proposed action. Sections 12(c) and (f), also cited in Bond & Share's application, do not even refer to fees. See pp. 27-29 herein.

6. Drexel likewise never agreed that the fee here involved to be paid by Bond & Share would be subject to Commission approval. While the Commission in its brief (p. 9; p. 37, ftn. 23) asserts that both Drexel and Bond & Share understood and agreed that the amount to be paid would be such amount as the Commission might approve, the actual testimony with respect to the only conversation concerning fee arrangements which took place between Drexel and Bond & Share, until long after Drexel's work was entirely completed, was as follows:

". . . that nobody could tell the extent of the work or what it was going to involve and I was warned that it would be subject in all probability to approval by the Securities and Exchange

Bond & Share, fully familiar with the amount and quality of the services rendered to it by Drexel, in arms-length negotiation, agreed with Drexel that $100,000 was fair and reasonable compensation for its services in advising Bond & Share with respect to the reorganization of Electric (R. 198a).

After consummation of the Plan, when applications for fees were filed with the Commission, Bond & Share and Drexel filed appropriate applications (R. 54a, 59a) requesting that the Commission approve a fee of $100,000 to be paid by Electric to Drexel for its services rendered to Bond & Share. Electric opposed the request that it pay the Drexel fee (R. 251a).

At the hearing before the Commission, uncontradicted evidence showed that $100,000 was a fair and reasonable fee for the services performed and that it had been agreed to as such by Bond & Share (R. 120a-211a).

In its findings, opinion, and order on the various fee applications, the Commission approved a payment by Bond & Share to Drexel of only $50,000 (R. 212a). It expressly directed this fee be paid by Bond & Share, not by Electric, and it refused to permit the payment by Bond & Share of any amount in excess of $50,000.

Bond & Share did not contest this order, but determined that it would itself, if permitted to do so, pay the

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Commission anyway, so there didn't seem to be much point in trying to do anything more.

"We understood they would pay us, of course, for our services, but they could only pay us, they believed, such amount as might be approved by the Commission." *Testimony of Edward Hopkinson, Jr., senior partner of Drexel & Co.*, R. 193a.

This clearly did not amount to an understanding or agreement that the Drexel fee would be only such amount as might be approved by the Commission, and Bond & Share has not taken that position. In addition, at the date of the conversation referred to, and even as late as the day the quoted testimony was given, Bond & Share planned to obtain reimbursement from Electric for the Drexel fee. This expectation was subsequently abandoned. Consequently Bond & Share's belief referred to is not one based on the facts as they actually developed.

entire Drexel fee of $100,000 (R. 283a). Bond & Share abandoned its prior position that the Drexel fee should be paid by Electric.

Consequently, no part of whatever fee Drexel now receives, will, directly or indirectly, be paid by or charged to Electric, the holding company which filed and was the subject of the Plan.

On June 25, 1952, the Commission filed in the District Court an application for enforcement of its order with respect to the various fees for which claims had been made (R. 270a).

Drexel filed objections thereto relating to its fee (R. 278a). Bond & Share's position, that it desired, if permitted, to pay the $100,000, was contained in a letter to Drexel (R. 283a) which was filed with the District Court by Drexel.

After argument, the District Court, in a one paragraph opinion, overruled the Drexel objections (R. 288a, 289a). From the order of the District Court, entered February 17, 1953 (R. 289a) pursuant to that opinion, Drexel appealed.

The Court of Appeals in a considered opinion unanimously reversed the District Court with respect to the Drexel fee (R. 305, 210 F. 2d 585), whereupon this Court granted the Commission's petition for certiorari (R. 341).

SUMMARY OF ARGUMENT.

The Public Utility Holding Company Act of 1935 is a long and complex statute which was drafted by competent legally-trained draftsmen, acutely conscious of the importance of their work and its impact on a multi-billion dollar industry. It does not purport to regulate all the activities of public utility holding companies. Instead it sets forth in almost tedious detail the things which cannot be done without Commission approval and the things which the Commission shall or may require of public utility holding companies and their subsidiaries.

Had the Congress wished to give the Commission the general authority over fees the Commission is claiming in this case, the Congress could and would have done so. But nowhere in the Act is the Commission granted the power to regulate the fees paid by a stockholder-parent in protecting its investment in a subsidiary company being reorganized pursuant to the *subsidiary's* voluntary Section 11(e) plan.

Under Section 11(e) [7] the Commission has jurisdiction over fees to be paid out of the estate being reorganized. Such jurisdiction is based on the Commission's duty to approve only a plan which is "fair and equitable to the persons affected", and the possibility that a plan otherwise "fair and equitable" might be rendered unfair if the reorganization estate is dissipated in the payment of exorbitant or unjustified fees. In re *Electric Bond & Share Company*, 80 F. Supp. 795 (S. D. N. Y. 1948).

Section 11(e) and the authority it reposes in the Commission to approve or reject a plan do not support any claim of jurisdiction over the fee Bond & Share, the parent, may pay to Drexel, however, because the assets of Bond & Share are not and could not in this proceeding be a part of the estate in reorganization. The "persons affected" by Electric's Plan and the reorganization of its assets are the stockholders of Electric, and they are manifestly not concerned with fees paid by Bond & Share to its adviser.

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7. The full text of Section 11(e) is contained in Appendix A hereto. In pertinent part such section provides as follows:

> "Sec. 11(e) . . . any registered holding company or any subsidiary company of a registered holding company may . . . submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b) If . . . the Commission shall find such plan . . . *fair and equitable to the persons affected by such plan*, the Commission shall make an order approving such plan . . ." (Italics supplied.)

It is far-fetched to suggest as a basis of Commission jurisdiction in this case that the shareholders of Bond & Share may be "persons affected" by the Electric Plan within the meaning of Section 11(e). There is no need, in determining whether or not a plan is "fair and equitable", to look beyond the immediate shareholders of the company (Electric) which is the subject of the reorganization plan. If the plan is "fair and equitable" to such shareholders, it cannot be otherwise to the shareholders of such shareholders.

To urge that the stockholders of Bond & Share are "persons affected" by Electric's Plan is futile in any event, for, even if they were, this would not give the Commission any power over the Drexel fee. The only power the Commission has under Section 11(e) is to approve the Plan as "fair and equitable" or to reject it. The Drexel fee is no part of the Plan and, not being payable out of the assets included in the Plan, can have no effect on its fairness to the "persons affected" by the Plan, whoever they may be.

In a colloquial sense, any action of Bond & Share (which had numerous other assets in addition to its interest in Electric), whether in another's reorganization or in the course of its ordinary affairs, "affects" its stockholders. But that is not the statutory sense, since that effect does not arise out of Electric's Plan, which is the sole basis of the Commission's jurisdiction. Payment of the Drexel fee by Bond & Share has no more effect on its stockholders than any other business expense of Bond & Share.

In the other section of the Act primarily concerned, Section 11(f),[8] the statutory language is clear that the juris-

8. The full text of Section 11(f) is contained in Appendix A hereto. In pertinent part such section provides as follows:

> "(f) *In any proceeding* in a court of the United States, whether under this section or otherwise, *in which a receiver or trustee is appointed* for any registered holding company, or any subsidiary company thereof . . . The Commission may . . . require that any or all fees, expenses and remuneration, to

diction there given the Commission over fees is limited to a court proceeding in which a trustee or receiver is appointed.

The Commission seeks to divert attention from the crucial phrase of this section—"in any *such* proceeding"—by roaming freely over the rest of the Act in an attempt to avoid the plain meaning of Section 11(f). Only by exorcising that phrase from the section can it hope to reach its conclusion. But like the mountain that must be climbed, the phrase is always "there".

There is no occasion to refer to legislative history when the language of a statute is plain, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S. 384, 395 (1951) (concurring opinion), *rehearing denied*, 341 U. S. 956 (1951); *Electric Bond & Share Co. v. SEC*, 303 U. S. 419, 438 (1938); *Lake County v. Rollins*, 130 U. S. 662, 670-71 (1899), and no language could be plainer than Section 11(f) is in this respect.

But reference to legislative history in this case, as detailed below, merely reinforces the plain meaning of the Section—it applies, and was intended to apply, only to reorganizations where a trustee or receiver has been appointed.

Even after performing the Commission's proposed major surgery on Section 11(f) and assuming, *arguendo*, as the Court of Appeals did below (R. 310), that the section might apply where no trustee or receiver is appointed, still the Commission's authority over fees is limited to those paid "in connection with" the reorganization—which can only mean a fee paid out of the assets of the reorganized company.

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whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, *in any such proceeding*, shall be subject to approval by the Commission." (Italics supplied.)

To the extent the Commission might claim to have had jurisdiction over some portion of the Drexel fee under other sections of the Act, such as Section 10, it exhausted that jurisdiction when it permitted the Application-Declaration of Bond & Share under those sections to become effective without any reservation of jurisdiction.

As a creature of statute the Commission has only the powers conferred by the Congress. A number of sections of the Act bestow fee jurisdiction on the Commission in carefully enumerated instances—a clear indication of Congressional intention not to confer general authority over all fees, but to limit the jurisdiction of the Commission over fees to the instances enumerated.

This conclusion is strongly reinforced by the fact that Section 11(f) as originally introduced conferred authority over all fees paid in connection with *any* reorganization and that this provision was replaced, in the course of the Senate's consideration of the bill, by the more limited provision now in the Act.

Despite this framework and history of the statute, the Commission's major point in this case, reduced to its essentials, is:

> Since the Commission has jurisdiction over so many kinds of transactions under the Act, including fees in certain instances, it somehow ought to have jurisdiction over the Drexel fee here involved—even though the very carefully drafted statute does not confer jurisdiction, and was amended clearly to deny it.

This reasoning, as well as the result it would reach, is untenable and clearly incompatible with a government of laws and should be rejected by this Court.

ARGUMENT.

A. The Commission Obtains No Jurisdiction Over a Fee to Be Paid by a Stockholder-Parent, and Not By or Out of the Estate of the Subsidiary in Reorganization, from the Commission's Power to Approve or Reject the Voluntary Reorganization Plan of the Subsidiary Under Section 11(e) of the Act.

Section 11(e) contains no express grant of jurisdiction to the Commission over fees and expenses arising out of reorganizations thereunder.

Since a Section 11(e) plan may be approved only if "fair and equitable to the persons affected", the Commission has been permitted to exercise jurisdiction over fees which diminish the reorganization estate in order to protect the integrity of its decision on the merits of the plan. In re *Electric Bond & Share Co.*, 80 F. Supp. 795 (S. D. N. Y. 1948). All of the cases relied on by the Commission in its brief as authoritative interpretations of Sections 11(e) and (f) are rooted in this principle.[9] All involve fees which were to be charged to the reorganization estate. None involves a fee which was not to be so charged, as in the instant case.

The opinion of Chief Judge Chase in the Court of Appeals followed this principle. He stated (R. 307-308):

> "Whatever fees and expenses are to be paid *by the reorganized company* serve to decrease its assets and persons who have an interest in such assets are, of course, affected by a plan which provides for payments which diminish their amount." (Italics supplied.)

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9. These cases are:

Standard Gas & Electric Co. v. SEC, 212 F. 2d 407 (8th Cir. 1954), *cert. denied* 348 U. S. 831 (1954); *In re Public Service Corp. of New Jersey*, 211 F. 2d 231 (3rd Cir. 1954), *cert. denied* 348 U. S. 820 (1954); *SEC v. Cogan*, 201 F. 2d 78 (9th Cir. 1952); *Halsted v. SEC*, 182 F. 2d 660 (D. C. Cir. 1950), *cert. denied* 340 U. S. 834 (1950); *In re Electric Bond & Share Co., supra.*

But he further held that where, as here, the payment does not come out of and therefore does not diminish the assets of the reorganized estate, the Commission has no jurisdiction over such payment. This is a logical corollary of the reasoning the courts have followed in finding that the Commission may control the fees to be paid out of the estate under the power to approve a plan if "fair and equitable to the persons affected".

Bond & Share's fees cannot conceivably affect the Electric Plan. What Bond & Share does with its assets is totally irrelevant to the fairness of that Plan. Yet the power to grant or withhold approval of Electric's Plan is the only basis under Section 11(e) for Commission jurisdiction over fees.

Apparently unable to deny this factual obstacle, the Commission attempts to stretch Section 11(e) by suggesting that the stockholders of Bond & Share may be regarded as "persons affected" by Electric's Plan within the meaning of Section 11(e). Chief Judge Chase met and disposed of this part of the Commission's argument as follows (R. 308a):

> ". . . But what fees Bond and Share may pay Drexel & Company, will not affect the asset position of Electric in the slightest. They will not affect the stockholders of Electric and so will not affect the stockholders of Bond and Share in any respect by reason of Bond and Share's being a stockholder of Electric, and Electric's being a subsidiary of Bond and Share. True such payment will 'affect' the stockholders of Bond and Share but not as a result of the provisions of Electric's plan and only as such stockholders are 'affected' by the expenses which Bond and Share incurs in its own business and pays out of its own funds. In other words, the fee to be paid Drexel & Company by Bond and Share is but a business expense of Bond & Share . . ."

If the Commission's argument were sound, the stock-

holders of a corporate stockholder of Bond & Share would also be "persons affected" by the Electric Plan, and in turn, their stockholders *ad infinitum*. Such a result is absurd, and cannot represent a proper interpretation of the Act.

Unable to derive the result it seeks from the sections of the Act involved in this case, the Commission has resorted in its brief to cases decided under unrelated sections of the Act and even under completely different statutes, none of which has any bearing on this case.

American Power & Light Company v. SEC, 325 U. S. 385 (1945), *rehearing denied*, 325 U. S. 843 (1945), cited by the Commission for the proposition that stockholders of Bond & Share are "persons affected" by Electric's Plan, decided only the procedural questions of the rights of stockholders to be heard on appeal, as a "person or party aggrieved" under Section 24(a) of the Act, from orders directed to their corporations. Such distinctly procedural decisions afford no guide to the meaning of the substantive requirements of Section 11(e) that a plan be "fair and equitable to the persons affected".

In one of the two cases involved in the *American* opinion, Okin, as a stockholder of Bond & Share, was permitted to appeal from a Commission order with respect to a proposed extension of a note held by Bond & Share. He was heard on appeal as though in a derivative cause of action since his charge of "illegality and fraud" made application to the Board of Directors of Electric "futile"—if his charges were true, his interest would not be represented. In a companion case in the Second Circuit which was not appealed, Okin was held to have no standing to appeal as a person "aggrieved" since he had not perfected his derivative rights under FED. R. CIV. P. 23(b). *Okin v. SEC*, 143 F. 2d 943 (2nd Cir. 1944).

In the other case covered by the *American* opinion, American Power & Light Company, as a stockholder in

Florida Power & Light Company, was permitted to appeal from a Commission accounting order which would have reduced Florida's surplus available for dividends even though Florida itself was protesting the order in another circuit. In that instance, however, American was heard on appeal because the Court held that it had a substantial financial or economic interest which was "distinct" from that of Florida. Thus the Court stated that the order "does not deprive the corporation [Florida] of any asset or adversely affect the conduct of its business in the manner it affects the petitioner [American], whereas the order has a direct adverse effect upon American as a stockholder entitled to dividends" (325 U. S., at 389). In the instant case, of course, there is in no sense a financial interest of Bond & Share's stockholders which is "distinct" from that of Bond & Share itself.

The other principal case relied upon by the Commission, *Leiman v. Guttman*, 336 U. S. 1 (1949), did not even arise under the Holding Company Act, but under Chapter X of the Bankruptcy Act. Chapter X expressly requires the court, in approving a reorganization plan, to satisfy itself that fees paid by "the debtor . . . or by *any other person*" (italics supplied) are reasonable. (52 STAT. 840, 897 (1938), 11 U. S. C. § 501 *et seq.*, § 621(4) (1952)). There is no such provision in the Holding Company Act.

Prior to the enactment of Chapter X, when the previous section of the Bankruptcy Act dealing with corporate reorganizations, Section 77B (48 STAT. 912 *et seq.* (1934)) contained no such express command, the courts did not attempt to regulate fees paid by individual stockholders from their own funds, but contented themselves with awarding or denying compensation out of the estate. See, e.g. *Teasdale v. Sefton Nat. Fibre Can Co.*, 85 F. 2d 379 (8th Cir. 1936).[10]

10. Under a provision of Section 77B specifically requiring the court to supervise the arrangements of committees, and relying in part on the law of New York as to the discharge of counsel, the court

That a specific provision in the new statute was required to move courts of equity, which are traditionally regarded as having broad implied powers, to the point of regulating fees paid by individual stockholders out of their own funds emphasizes the invalidity of the Commission's attempt in this case to assert jurisdiction over such a fee without express authority in the Act. For, as an administrative agency, its powers must in every case be traced to a wellspring in the Act.

At about the time the Plan was consummated, Bond & Share had total assets with a carrying value of about $445,000,000, including $36,000,000 carrying value for its holdings in Electric. (See *Re Electric Bond & Share Co.*, H. C. A. Rel. No. 9980, July 28, 1950, p. 21). Under the circumstances, Bond & Share had not only the right, but virtually the duty, to seek the best advice it could get in attempting to protect that investment in the course of Electric's forced dissolution.

It made an arms-length agreement with Drexel, a non-affiliated firm, and, when the services had been completed and it had full knowledge of their value, Bond & Share agreed that $100,000 constituted fair and reasonable compensation to Drexel for those services.

Can there be any warrant in public policy—there is none in the Act—for striking down such a normal, reasonable business arrangement?

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did regulate counsel fees paid by a creditor's committee out of dividends paid to the depositing creditors. *Re McCrory Stores Corporation*, 91 F. 2d 947 (2d Cir. 1937), *cert. denied* 302 U. S. 725 (1937). But the courts did not, as the Commission here seeks to do, infer general authority over fees from their duty to supervise the estate and the arrangements of committees.

B. The Commission's Fee Jurisdiction Under Section 11(f) Pertains Only to Reorganizations in Which a Trustee or Receiver is Appointed.

Section 11(f), the trustee and receivership section, provides in pertinent part as follows (for full text, see Appendix A hereto):

> "*In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed* for any registered holding company, or any subsidiary company thereof . . . *In any such proceeding* a reorganization plan . . . shall not become effective unless . . . approved by the Commission . . . The Commission may . . . require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, *in any such proceeding*, shall be subject to approval by the Commission." (Italics supplied.)

The Commission's contentions that this section conferred jurisdiction over the Drexel fee were properly rejected by the Court of Appeals.

The principal ground for the conclusion of the Court below is one clear and unalterable fact: the phrase "in any such proceeding" in the final sentence of Section 11(f) limits such jurisdiction to court proceedings in which a trustee or receiver is appointed. Nothing could be clearer.

There is no other remotely reasonable meaning for the section.

On this point, Chief Judge Chase stated (R. 309-10):

> "The appellant contends that the provisions for the approval of fees, expenses and remuneration in this subsection is limited by the words 'in any such proceeding' to those in which a trustee or receiver should be appointed and, since there was no such ap-

pointment in this proceeding, the subsection does not here apply. It is to be noticed that subsection (f) is not confined to Sec. 11 proceedings but applies to any proceeding in any court of the United States in which a trustee or receiver is appointed for any registered holding Company, or any subsidiary thereof. As to that the words 'whether under this section or otherwise' leave no doubt whatever. Thus the only words of limitation are 'in which a trustee or receiver is appointed for any registered holding Company, or any subsidiary thereof,' and the phrase 'in any such proceeding' found in the last sentence in the subsection can refer only to a proceeding so described by the limiting words. The same words are used earlier in the subsection to make it plain that whenever a trastee or receiver has been appointed for any registered holding company, or its subsidiary, in any proceeding in the federal courts no reorganization plan may emerge from the proceeding and become effective 'unless such plan shall have been approved by the Commission' after hearing, if it wants to have one, prior to the submission of the plan to the court. And finally, even where the proceeding had been as closely controlled by the court as it would be when a court appointed trustee or receiver was an active participant in it, such supervision was supplemented by making all fees, expenses and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership in which the end result was an effective reorganization plan subject to the approval of the Commission, provided it so required by rules, regulations or by order which it might deem necessary or appropriate in the public interest or to protect investors or consumers. It was to make this clear that the provision for Commission approval of fees, expenses and remuneration was put into subsection (f) and had Congress intended to make that provision applicable to

> proceedings other than the particular kind described in the subsection it, presumably, would have omitted the word 'such' from the phrase 'in any such proceeding' in the last sentence of the subsection. Now to construe the provision as though the word 'such' were not in the phrase would amount to a broadening as far reaching as the scope of the words 'in any proceeding'."

There is no occasion here to refer to legislative materials. "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous . . ." *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S. 384, 395 (1951) (concurring opinion). "It is unnecessary to review . . . the cited statements from the legislative halls. The Act speaks for itself with sufficient clarity." *Electric Bond & Share Co. v. SEC*, 303 U. S. 419, 438 (1938).

However, in the case at bar, such legislative history as is pertinent to the Act as passed merely confirms the plain meaning of the section.

The single most significant point in the legislative history is the deliberate change which the Congress made with respect to the Commission's jurisdiction over fees paid in connection with reorganizations.[11]

The form of Section 11(f) in S. 1725 (therein numbered Section 11(d)), as originally introduced on February 6, 1935, and S. 2796, as originally reported out of Committee May 9, 1935, granted the Commission jurisdiction over fees paid in connection with *any* reorganization. See (a) and (b) in Appendix B.

But in the bill as passed, the section was changed in a vital respect. The more general fee jurisdiction was eliminated, and there was substituted the present form of the

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11. Appendix B hereto shows the pertinent legislative drafts of Section 11(f). Pertinent excerpts from the Senate debate are contained in Appendix C hereto (numbers have been supplied to the various excerpts in Appendix C for convenience of reference).

section, quoted above (p. 18), with the limiting words "in any such proceeding". See (c) in Appendix B. And the words "in any such proceeding" can mean only a proceeding in which a receiver or trustee is appointed.

The statement by Senator Wheeler [12] and the committee report which the Commission quotes at pages 24 and 25 of its brief relate to the bill *prior to the change*.

The bill which was voted into law does not say "in any proceeding". It says "in any such proceeding." Such a change loses none of its significance because not separately discussed on the floor.

The earlier drafts had also contained several other features which were deleted in Section 11(f) as finally adopted. The discussions which did take place as to those other changes throw sufficient light on the change from *any* proceeding to "any *such* proceeding" to show that the Congress knew what it was doing and did it deliberately. These other changes were with respect to (1) the power given the Commission in the earlier drafts to institute reorganization proceedings under Section 77B if the Commission determined that a registered holding company or subsidiary was insolvent or unable to pay its debts as they mature, and (2) the requirement in the earlier drafts that the court appoint the Commission as trustee or receiver upon the Commission's request.

The debates on these points make it clear that the objective of Congress in Section 11(f) was to use the Commission as a "watch dog" to protect investors from "racketeering receiverships".

This appears throughout the debate. "We have had evidence . . . of insolvency receivership matters"; "scandals in connection with the receiverships"; "the reason for these provisions . . . is . . . a notorious fact . . . that a racket has existed in the matter of these re-

12. See (1) in Appendix C.

ceiverships"; "All we are seeking to do in this whole section is to protect persons . . . from a racketeering receivership"; and "to put an end to an evil . . . receiverships and scandals which have developed". See particularly excerpts numbered (3), (4), (8), (27), (30), and (31)-(37) in Appendix C hereto.

The two powers above referred to which were originally proposed to be conferred on the Commission—the power to require 77B reorganizations and the power to require its own appointment as trustee or receiver—were deleted because the Congress did not regard these powers as necessary to the accomplishment of this objective.

Senator Wheeler, floor manager of the bill, himself proposed the amendment depriving the Commission of its power to initiate bankruptcy proceedings (excerpt (5) in Appendix C) and accepted the amendment making appointment of the Commission as trustee or receiver discretionary with the court rather than mandatory. 79 Cong. Rec. 8939 (1935).

To meet the receivership problem, the Congress, in Section 11(f) as finally passed, gave the Commission certain powers in connection with the appointment of trustees and receivers and with respect to reorganization plans and fees in connection therewith. But, to meet in part objections that the section went too far, it limited the exercise of those powers to reorganizations where a trustee or receiver was to be appointed by a court.

The phrase "under Section 77B or otherwise" was changed to "in any such proceeding" (see (c) of Appendix B) without any discussion or vote on the floor of the Senate, and the change appears for the first time officially in the bill which was sent to the House. 79 Cong. Rec. 10307 (1935).

It left the Commission power over fees where a possible "racketeering receivership" was involved. It was a change entirely consistent in objective with the other two changes mentioned above.

Though discussion was in large part concentrated on Section 11, no question was raised about the change in this sentence throughout the further consideration of the bill. It is inconceivable that a change made with such preciseness and clarity, in a section subject to the widest study and criticism from all points of view, would not reflect the purpose which Congress sought to achieve.

With no ambiguity in either the Act or the legislative history, the unanimity with which the Court of Appeals held below that Section 11(f) applies only when a trustee or receiver has been appointed was only to be expected.

Since no trustee or receiver was appointed in the instant case, Section 11(f) can have no application.

Until recent years, the Commission itself apparently invoked Section 11(f) only when a trustee had been appointed. Compare *Laclede Gas Light Co.*, 25 SEC 382 (1947) with *International Hydro Electric System*, 27 SEC 580 (1948).

Further, the Commission's present argument under Section 11(f) proves too much. If the Commission's construction of Section 11(f) were correct, it would have jurisdiction over fees paid by any individual stockholder, whether or not such stockholder was a statutory parent. For, so far as the Commission's construction of Section 11(f) is concerned, there is no justification for treating one stockholder differently from any other—be he a statutory parent or not.

Yet the Commission has apparently never asserted any jurisdiction over fees paid by stockholders generally, but has on numerous occasions contented itself with granting or denying compensation out of the estate. See, e.g., *Columbia Gas & Electric Co.*, 17 SEC 549 (1944); *Laclede Gas Light Co.*, 25 SEC 382 (1947); *National Power & Light Co.*, H.C.A. Rel. No. 10321, Dec. 28, 1950; *The North American Co.*, H.C.A. Rel. No. 10533, May 7, 1951.

The Commission's position on Section 11(f) must fail in this case, even apart from the construction of the phrase "in any such proceeding", since Section 11(f) confers jurisdiction only over fees paid "in connection with" a reorganization.

A fee paid "in connection with" a reorganization as used in Section 11(f) can only mean a fee paid out of the assets of the reorganized company.

This point [13] was aptly and succinctly stated by the Court below as follows (R. 310):

> "If we assume, arguendo, that such a construction is permissible, the provision does not even then reach the fee to be paid this appellant unless the words 'any and all fees, expenses and remuneration to whomsoever paid, *in connection with*' (emphasis added) include payments which are not made by the Company whose attempted reorganization is the object of the proceeding, or which in any way change the financial impact of the plan which is the outcome of the proceedings, whatever that may be, upon persons having a bona fide interest in it. We are not prepared so to construe them for the reasons stated in our discussion of the jurisdiction of the Commission in respect to the control of fees and expenses under subsection (e) and, as the payment of the fee which Bond and Share has agreed to pay the appellant is a business expense of that company and not an obligation of, or one to be imposed upon, Electric, we hold that it is not a fee paid 'in connection with' the proceeding for the reorganization of Electric within the meaning of the just quoted phrase as used in subsection (f)."

At one time, the Commission itself apparently agreed with this construction of the "in connection with" phrase

13. While the Commission on p. 32 of its brief refers to this as the "heart" of the opinion of the Court of Appeals below, it seems quite clear it was a secondary reason for holding that Section 11(f) did not support the Commission in this case.

in Section 11(f). It expressly disclaimed interest in any fee which might be paid to counsel by individual stockholders from their own funds even where a trustee had been appointed and Section 11(f) was therefore pertinent. See *International Hydro Electric System*, 27 SEC 580, 604 (1948).

In reaching this conclusion the Court of Appeals below was aware of and cited in its opinion the cases which the Commission relies on as supporting the general authority it claims under Section 11(f), *Halsted v. SEC*, 182 F. 2d 660 (D. C. Cir. 1950) and *SEC v. Cogan*, 201 F. 2d 78 (9th Cir. 1952). The Court quite properly pointed out (R. 308) that the language in those cases "should be read in the light of the issues there being decided." In both cases, the fee was to be paid out of the reorganization estate.

The issues raised in this case were not discussed in the opinion in either the *Halsted* or *Cogan* cases. The jurisdiction of the Commission over fees was not challenged in either case and was not argued in the briefs. This is scarcely surprising since both cases involved fees and expenses of opposition stockholder groups whose only hope of obtaining compensation was through an award by the Commission.

In the *Cogan* case, in addition, the plan itself foreclosed any question of fee jurisdiction by providing for the payment by the reorganized company of a specified fee to counsel for a stockholders' committee. The Commission disapproved this provision on the ground of an alleged improper conflict of interest on the part of such counsel. The reversal of this Commission order by the District Court was affirmed by the Court of Appeals solely on the question of the propriety and the scope of the District Court's review of the merits of the order.

Other complicating factors make the *Halsted* case unique. It arose upon an appeal from an order of the Commission under Section 12(e) of the Act and Rule U-62 of

the Commission's Rules and Regulations, both of which deal only with solicitations of proxies. The order under review only denied a committee permission to circularize stockholders for contributions to defray expenses pending the hoped-for payment of such expenses out of the reorganization estate after the consummation of the plan.

The opinion of the Court makes it clear that it regarded the Commission's action under Section 12(e) as justified to protect the jurisdiction it might later have over fees to be paid out of the estate in the subsequent proceeding in the District Court under Section 11(e) for the enforcement of the plan.

This is indicated by the statements in the Court's opinion at pages 666 and 667 of 182 F. (2d):

> "Beyond question the coverage of Section 11(f) includes fees payable *in the court proceeding from company funds*, and it is from those funds (and solely from those funds) that the committee here involved has announced it will ultimately seek its compensation." (Italics supplied.)
>
> • • •
>
> "The Commission could properly find that jurisdiction to be threatened with defeat by the proposed solicitation. It is a power which deserves protection from evasion and circumvention. . . . We believe that *under section 12(e)* the Commission had power to deny the permission requested and that its action should not be disturbed." (Italics supplied.)

The Commision also cites *Leiman v. Guttman*, 336 U. S. 1 (1949) and a footnote from *American Power and Light Co. v. SEC*, 329 U. S. 90, 114 (1946). As heretofore demonstrated (supra, p. 16) the *Leiman* case, involving an altogether different statute, in no way supports the Commission's attempt to override the plain meaning of Section 11(f). And the footnote quoted from the *American Power & Light* case is the most casual kind of dictum—a general

description of the nature of Sections 11(f) and 11(g) in a case in which fees were not even in issue.

The only appellate court which has had any occasion to study the questions raised in this case is the Court of Appeals below in this case. That court unanimously concluded that the Commission is without jurisdiction over the Drexel fee.

C. The Commission Does Not Achieve Jurisdiction From Sections of the Act Not Applicable Nor From the "Bootstrap" Argument.

The Public Utility Holding Company Act of 1935 did not purport to grant the Commission power over all activities of holding companies and their subsidiaries.

A technical and complex statute, it contained specific grants of jurisdiction over carefully enumerated kinds of financial transactions, as well as the power to bring about integration and simplification under Section 11.

In connection with certain of these financial transactions, such as security issues and acquisitions of securities and utility assets, the Commission was granted in negative terms a limited jurisdiction over fees incurred.

None of these negative fee provisions gives the Commission authority over the Drexel fee in the instant case.

Bond & Share in this case filed an Application-Declaration under Sections 10, 12(c) and 12(f) with respect to certain of its own transactions resulting from the consummation of the Electric Plan.[14] The Commission approved that Application-Declaration and permitted it to become effective without making any adverse finding and without

14. Bond & Share's Application-Declaration also referred to Section 11 although it was taking no action under that section. It was apparently deemed applicable because the action being taken by Bond & Share was consistent with the objectives of Section 11. The inapplicability of the Commission's fee jurisdiction under Section 11 to the Drexel fee is discussed in the preceding sections of this brief.

reserving jurisdiction to investigate or approve fees after the consummation of the transactions covered by the Application-Declaration.

Neither Sections 12(c) nor 12(f), which were cited in the Bond & Share Application-Declaration, refers to fees at all.

Section 10, also cited by Bond & Share in its Application-Declaration, confers its fee jurisdiction through a negative requirement: the Commission is *required* to approve an acquisition *unless* it finds, among other things, that fees are not reasonable. Section 10(b)(2). There is no grant of jurisdiction over fees except as findings are made at the time of approval or disapproval of the proposed action. In unconditionally granting and permitting to become effective the Application-Declaration, the Commission has completed its function under Section 10 and no jurisdiction over fees remains in the Commission under that Section.

Thus, to the extent the Commission might claim to have had fee jurisdiction with respect to the limited portion of Drexel's services allocable to the acquisition of securities under Section 10, that jurisdiction has been exhausted.

Once such an approval has been granted and the transaction consummated in reliance on it, the approval cannot thereafter be effectively revoked and re-granted with retroactive conditions. *Chapman v. El Paso Natural Gas Co.* 204 F. 2d 46 (D. C. Cir. 1953). It would be not only violative of the language of the Act but manifestly unreasonable to read any continuing jurisdiction into Section 10. Business transactions cannot be consummated upon the basis of revocable approvals.

Apparently the Commission itself does not press its argument that Section 10 authorizes part of its action in this case. For at pages 14 and 15 of its brief the Commission clearly subordinates this argument to what it terms the "more important", "primary" argument based on Section 11, using Section 10 (one of the enumerated instances in which it does have some fee jurisdiction) only

to support its arguments as to the interpretation of Section 11.

But the very act of the Congress in granting negative fee jurisdiction in the specific instances just referred to, although inapplicable in this case, is a strong argument that the Commission has no general unexpressed authority over fees. "The details with which the exemptions in this [Fair Labor Standards] Act have been made preclude their enlargement by implication." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618 (1944) *rehearing denied* 323 U. S. 809 (1944).

Where abuses adversely affecting the public had been experienced, the Congress enacted specific grants of jurisdiction over enumerated types of transactions, with specific references to fees in some of them. On the basis of simple logic and familiar principles of construction, one must conclude that there was no Congressional intention to grant further, unexpressed general powers over fees paid by a registered holding company.

Even the so-called "indictment" of holding companies, Section 1(b) of the Act, does not mention fees. And Section 1(c) states the entire Act is to be interpreted to meet the problems and evils there enumerated.

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U. S. 288, 309 (1944). This principle applies to the Commission as well as any other agency. In re *Electric Bond & Share Co., supra*, 80 F. Supp. at p. 798.

Bereft of support in the Act, in the legislative history or in the decided cases, the Commission resorts to an argument in direct contradiction to this fundamental principle of administrative authority.

The major point in the Commission's brief is that since it has jurisdiction over what it terms "substantially all" major financial transactions of registered holding com-

panies, and over fees in a number of such transactions, Section 11 should be interpreted to give it jurisdiction in this case. (Commission brief, pp. 14-15, 18-22).

Nowhere in the Act is the Commission granted general jurisdiction over "substantially all" of such transactions. If that were true, the Act would not be so detailed and carefully drawn. Indeed, if there were such a vague statutory grant of power to an administrative commission, it would doubtless be void for lack of specificity.

In any event, the gap between "all" and the claimed "substantially all" is the difference between carefully granted statutory power and complete arbitrary power.

If the grant of extensive but specific powers can be used to override limiting phrases contained in a particular section, it is difficult to find the limits of the authority of regulatory agencies or to give meaning to a Congressional enactment.

Finally, the Commission uses the well worn "bootstrap" argument which attempts to ground jurisdiction in a series of past instances where power has been exercised without challenge. (Commission brief, pp. 17, 35-37; footnotes 1, 2 and 3 at pp. 4, 5 and 6.)

It is sufficient to refer to the remarks of Judge Pine in the case of *Youngstown Steel & Tube Co. v. Sawyer*, 103 F. Supp. 569, 575 (D. D. C. 1952):

> "He [the defendant] next refers to seizures by former presidents, some during war and several shortly preceding a war, without the authority of statute, but it is difficult to follow his argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality. Apparently, according to his theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree."

This view was approved on appeal by the Supreme Court in 343 U. S. 579 (1952).

CONCLUSION.

The unanimous decision of the Court of Appeals for the Second Circuit correctly interpreted and applied the Act in this case and its decision should be affirmed.

Respectfully submitted,

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APPENDIX A.

Reprint of Section 11(e) and Section 11(f) of the Public Utility Holding Company Act of 1935. 49 Stat. 820, 15 U. S. C. 79(k).

"Sec. 11 • • •

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever

located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for

the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

APPENDIX B.

Legislative Drafts of Section 11(f) of the Public Utility Holding Company Act of 1935.

(a) *Section 11(d) of S. 1725, 74th Cong., 1st Sess., and Section 10(d) of H. R. 5423, 74th Cong., 1st Sess., identical bills except for the short title and the number of sections, introduced in the Senate and House, respectively, on February 6, 1935:*

"If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', as amended. In any such proceedings or in any other proceedings in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization or liquidation of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court, at the request of the Commission, shall have jurisdiction, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. In any such proceedings a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be prepared in the first instance by the Commission or,

subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. All fees, expenses, and remuneration paid in connection with any reorganization or liquidation of a registered holding company or subsidiary company thereof, whether under said section 77B or otherwise, shall be subject to the approval of the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceedings as the court may allow."

(b) *Section 11 (f) of S. 2796,* SEN. REP. *No. 621, 74th Cong., 1st Sess., May 7 (calendar day, May 9) 1935:*

"If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' as amended. In any proceeding pursuant to this section or in any other proceeding in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization, dissolution, liquidation, bankruptcy, or receivership of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court shall have jurisdiction to appoint a trustee or receiver, and, at the request of the Commission, shall have power, and it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore

have been appointed. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, whether under said section 77B or otherwise, shall be subject to approval by the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow."

(c) *Section 11 (f) of S. 2796*, SEN. REP. *No. 621, 74th Cong., 1st Sess., May 13 (calendar day, June 7), 1935:*

~~"(f) If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', as amended~~

~~In any proceeding pursuant to this section or in any other proceeding in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization, dissolution, liquidation, bankruptcy, or receivership of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court shall have jurisdiction to appoint a trustee or receiver, and, at the request of the Commission, shall have power, and it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver,~~

"(f) *In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court shall have power, and, at the request of the Commission, it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court*, whether or not a trustee or receiver shall theretofore have been appointed. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors

or consumers, require that any or all fees, expenses and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, ~~whether under said section 77B or otherwise~~ *in any such proceedings*,[1] shall be subject to approval by the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow."[2]

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1. The singular of this word appears instead of the plural in the version passed by the Senate on June 11, 1935.

2. An amendment proposed on June 10, 1935 by Senator McKellar to strike this last sentence of Section 11(f) of S. 2796 was agreed to without an objection on the Senate floor.

APPENDIX C.

Excerpts From Congressional Record, 74th Cong., 1st Sess. (1935).*

(1) Senator Wheeler (Chairman of the Senate Committee on Interstate Commerce and floor manager of the bill):

"That brings me to the last point—the protection of the holding-company investor by the Securities and Exchange Commission. I do not blame the average investor for shuddering at the very word 'reorganization.' In the usual process of reorganization and regrouping of properties the investor might be given the same milking by reorganizing bankers and their lawyers that he has had to take in railroads, real estate, and every other kind of corporate reorganization. To meet that very danger the bill puts the entire process of reorganization, including fees and so-called 'reorganization plans,' under the control of the Securities and Exchange Commission.

"It also carefully requires the Federal courts to appoint the Securities and Exchange Commission itself trustee in any reorganization or dissolution proceeding. It does that to protect the investor by avoiding the jockeying for the selection, by a busy judge or from a neatly weighted panel, of those individual trustees who will 'play ball' with the right people. Such jockeying, every realistic lawyer and every realistic court knows, goes on, however subtly and secretively, in every bankruptcy, receivership, and reorganization proceeding. That provision has an exact precedent in the Federal statute which makes the Comptroller of the Currency, and not someone at large, cleverly thrust upon a court, the receiver of each closed national bank.

* Numbers supplied to the various excerpts for convenience of reference.

It has an exact precedent in State statutes which make a commissioner of insurance, and not someone at large, the receiver of each failed insurance company."

79 CONG. REC. 4607 (1935).

* * *

(2) Senator McKellar:

"Below that is the provision that it shall be the duty of the court to appoint the Commission as sole trustee or receiver. If such a provision had been in existence during the last 5 years, it would have resulted in putting into the hands of this Commission every company, I suppose, for this reason: A company does not have to be insolvent; all that is provided in the paragraph I have read is that if in the judgment of the Commission the company is unable to pay its debts as they mature, it shall be put into the hands of a receiver. The power in the Commission is not circumscribed, and to my mind it is a provision which would ruin the business of the utility companies entirely, and I do not think that is the purpose of the bill . . .

"It seems to me this sort of power would be an unwarranted one to give to any commission. Under the terms of the proposed act the Commission would be given the power, whenever in its judgment a company was unable to pay its debts, to put it into the hands of a receiver. It would have carte blanche to put any concern in the country into the hands of a receiver.

"I should like to have the Senator explain that provision.

(3) "MR. WHEELER. Mr. President, this provision was inserted for the purpose of protecting the investors in public utilities. We have had evidence before the Committee on Interstate Commerce of scandalous receivership matters all over the country in connection

with railroad reorganizations. It has been notorious. There have been investigations of receiverships by the Senate, and it has been shown that a court appoints some friend or some politician as a receiver of one of the railroads or one of the corporations, and they keep the company in the hands of the receivers for years, until they take everything away, and the poor stockholders get nothing at all.

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[After reference was made by Senators Minton and Barkley to the provision of the banking law for appointment of the Comptroller of the Currency as receiver of insolvent banks]

(4) "MR. WHEELER. Everyone will admit, I think, that there has not been one-tenth of the scandals in connection with the receiverships of banks as have occurred in cases of private receiverships which have been set up all over the country."

Id. at 8443-44.

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(5) "MR. WHEELER. Referring now to page 49, I move to amend by striking out lines 8 to 25, inclusive, and substituting therefor the following.

(6) "THE PRESIDENT pro tempore. The amendment will be stated.

(7) "The CHIEF CLERK. On page 49 it is proposed to strike out lines 8 to 25, both inclusive, and down to and including the word 'appointed' in line 2, page 50, and to insert in lieu thereof the following:

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company or any subsidiary company thereof, the court shall have power, and, at the request of the Commission, it shall be the duty of the court to constitute and appoint the Commission as sole trustee

or receiver subject to the direction and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed.

(8) "MR. WHEELER. In other words, we greatly liberalize that section, because as it read before it provided that if, in the judgment of the Commission, any registered holding company or any subsidiary company thereof was insolvent or unable to pay its debts, the Commission should have the power to institute proceedings for reorganization of such company under section 77B of the Bankruptcy Act. This amendment takes from the Commission the power to go into court and ask that a company be placed in the hands of a receiver because it is insolvent or because it cannot pay its debts. We simply say to the court now, 'In the event you appoint a receiver, then upon the request of the Commission you shall appoint the Commission such receiver, but the Commission shall be subject to the rules and orders of the court.'

"The reason for these provisions is that it has been a notorious fact, as we all know, and as the Chairman of the Judiciary Committee [MR. ASHURST] especially knows from his investigations, that a racket has existed in the matter of these receiverships. The section as amended, we believe, provides for the protection of investors in companies in the event they go into the hands of receivers—registered holding companies or their subsidiaries, companies which are engaged in interstate commerce—and only those companies—and that the Commission shall act as receiver and shall be subject to the direction and orders of the court.

(9) "MR. BORAH. Mr. President——

(10) "THE PRESIDENT pro tempore. Does the Senator from Montana yield to the Senator from Idaho?

(11) "MR. WHEELER. I yield.

(12) "MR. BORAH. I understand the sole effect of the amendment is to make it obligatory upon the court

to appoint the Commission as trustee or receiver in case the court adjudges the parties bankrupt.

(13) "MR. WHEELER. The purpose of the amendment is to make it clear that when the court appoints the Commission trustee or receiver, the Commission is to be subject always to the direction and orders of the court; and it is further designed to take away the power of the Commission to investigate bankruptcy proceedings under section 77B. The provision as it stands at the present time has been greatly criticized in some of the advertisements of some of the holding companies. They have held it out that what we were seeking to do was to take them over and have them condemned, thrown into receivership, and that the intention was to have the Government take them over. Of course, no such intention was in mind at all. All that was intended was exactly what we are doing here now for the protection of the investors. We have even taken from the Commission the right to go into court and ask that the company be placed in the hands of receivers. So that with this amendment, only if the court orders the company into receivership can the Commission ask that it shall be appointed as receiver or trustee.

(14) "MR. HASTINGS. Mr. President, will the Senator from Montana yield?

(15) "MR. WHEELER. I yield.

(16) "MR. HASTINGS. My recollection of the section, without having read it for a day or two, is that under the bill as reported by the committee the Commission itself could make application to the court if, in its judgment, any registered holding company or any subsidiary company thereof was insolvent or unable to pay its debts?

(17) "MR. WHEELER. That is correct.

(18) "MR. HASTINGS. Then the bill provided that, having made the application to the court, the court was compelled to appoint the Commission trustee, and

then that there could be no reorganization except the kind of reorganization suggested by the Commission itself. In other words, under the bill we have the Commission itself, which has no monetary interest in the matter, and which makes application for the bankruptcy proceeding, given power to have itself appointed trustee and then itself propose the plan of reorganization. I should like to know what changes the amendment makes in those three respects?

(19) "MR. WHEELER. The amendment completely changes the first of those three things, because, in the first place, it takes away from the Commission the right to go into court and ask the court to appoint a receiver.

(20) "MR. HASTINGS. That is the important matter.

(21) "MR. WHEELER. Yes. As I say, the provision was not intended as it has been interpreted; but I can readily understand how, in view of the language, it might raise a fear in the minds of some people, and they might say, 'The Commission may throw us into receivership and be appointed receiver, and then have a reorganization plan', and so forth. They might say, 'It is an inducement for the Commission to throw us into the hands of a receiver'; but the Senator from Delaware will agree with me that this language changes the whole situation.

(22) "MR. HASTINGS. Of course it is a little difficult to follow the language and remember it when one has not the amendment before him; but let me make an inquiry. The Senator says the amendment removes the first objection, which I think was the most serious one.

(23) "MR. WHEELER. Absolutely.

(24) "MR. HASTINGS. Does the amendment leave the other two provisions? As I remember, the Sena-

tor said it does provide that the Commission shall be named trustee or receiver by the court.

(25) "MR. WHEELER. That is correct.

(26) "MR. HASTINGS. Does it in any way affect the persons who may suggest the plan of reorganization?

(27) "MR. WHEELER. No. I will say to the Senator from Delaware that another Senator is talking to me about that subject, and we are trying to work out an amendment. On that last point of who may suggest the plan of reorganization, section 11 is quite clear that the suggestion may come from any interested person. It is not limited to the Commission's own plan, so long as the plan is eventually approved by the Commission. All we are seeking to do in this whole section is to protect persons who have invested their money from a racketeering receivership, such as the Senator well knows has taken place in many cases throughout the country, and particularly as was investigated by the Judiciary Committee of this body, under the leadership of the Senator from Arizona [MR. ASHURST].

(28) "The PRESIDENT pro tempore. The question is on agreeing to the amendment offered by the Senator from Montana.

(29) "The amendment was agreed to."

Id. at 8844-45.

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[Referring to the provision requiring that the Commission be appointed trustee]

(30) "MR. WHEELER. The only thing we are trying to do in this bill, with reference to this matter, is to put an end to an evil. I do not know whether the Senator from Utah [MR. KING], who sits before me, has been a member of the subcommittee of the Judiciary Committee which has been investigating receiverships and scandals which have developed. . . . The Congress

of the United States recognized the scandals which have been going on in the appointment of receivers all over the country. It is a notorious fact that there have been scandals in receiverships and trusteeships, and in connection with the Milwaukee Railroad particularly.

(31) "MR. MCKELLAR. I agree with the Senator that there have been scandals in connection with receiverships time and again; but that does not justify the Congress in adopting an unconstitutional provision to deal with the condition."

Id. at 8857.

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(32) "MR. WHEELER. . . . When a reorganization plan is offered, if the utilities can go to some one of the Federal judges and pick out a receiver or a trustee who is friendly to them, they can perpetrate a fraud and a racket upon the investor . . .

(33) "MR. CLARK. Does the Senator from Montana know any reason on earth why Federal Commissioners appointed by the President and confirmed by the Senate necessarily have a higher standard of honor, or a higher standard of any sort, than a Federal judge appointed by the President and confirmed by the Senate?

"I must say to the Senator from Montana that I cannot go along with him in this statement that somebody may sneak in to one of the Federal judges. Somebody is just as likely to sneak in to a member of the Federal Securities Commission . . .

(34) "MR. BARKLEY. Just a moment. Another thing that enters into the matter is to avoid, as the Senator from Montana has repeatedly said, the appointment of outsiders or insiders, as a matter of fact; and that is no reflection on the integrity of the court. We all know how frequently these things come about. Application is made to the court for the appointment of a receiver or a trustee— . . .

(35) "MR. MCKELLAR. I imagine the framing of this particular language was brought about—indeed, I am rather inclined to think the chairman of the committee told me it was—because of many scandals in the appointment of receivers. We all know that that has taken place; but with this language changed as I propose to change it, a repetition of such scandals would be almost impossible.

(36) "MR. CLARK. Mr. President, if the language which the Senator has proposed to insert in the bill is offered as a result of just criticisms or unjust criticisms of Federal receiverships, the remedy is to change the law, and, if necessary, to change the Constitution so as to make it easier to impeach or remove Federal judges who misuse their offices.

"The whole theory of a receivership is that the insolvent estate is put into the hands of a judge; and when a receiver is appointed, according to the theory of the law as it has always been up to the time this particular measure came along, the theory has been that the receiver was merely the agent of the court for whom the court was responsible, over whom the court exercised the ultimate control; and we all know that judges have been impeached, and once in a while a judge has been convicted, because of the acts of his receivers . . .

(37) "MR. WHEELER. An amendment has been adopted which the Senator from North Carolina and I worked out. I have no interest in the matter, and nobody else has, except that, so far as it is humanly possible, we want to protect the investors who, the utility people say, will be ruined. I know, as a matter of fact, that one of these companies which has been one of the worst in the United States will probably apply to the courts in a very short time for a receivership or trusteeship for the purpose of reorganizing, because it is in such shape that that must be done.

I know just as well as that I am standing here that if that is done they expect to go into the Federal court and undertake to have trustees and receivers appointed, and without casting any reflection upon any court, we do not need to do that. The Senate of the United States, under the leadership of the Chairman of the Judiciary Committee of the Senate, has been investigating receiverships from one end of the country to the other, and every Member of the Senate who has followed the investigation knows that there has been wide-spread scandal . . .

(38) "MR. HASTINGS. Let me call the attention of the Senator from Tennessee to the last four lines of paragraph (f), which we are now discussing, in response to the suggestion that the Commission is to be appointed receiver because of the bad conditions which have been developed in connection with the appointment of receivers. Most of those criticisms are due to the compensation allowed receivers. But in the very bill before us it is provided that the Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow. I should like to inquire how that relieves us under any condition of the trouble we have experienced in the past.

(39) "MR. MCKELLAR. Mr. President, I may say that I hope to have those lines stricken out, because I think that is an open invitation to bring about the very state of scandal of which the Senator from Montana, the chairman of the committee spoke a few moments ago and I do not think such a provision ought to be in the bill."

Id. at 8936-38.

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(40) "MR. BONE. Mr. President, I have just reentered the Chamber, and I understand that a moment

ago an amendment was adopted which restricts the appointment of a receiver in insolvency proceedings or rather prevents the naming of the Commission as trustee or receiver. I regret that has been done. I feel that some of my brethren may live to regret it.

"The Associated Gas & Electric Co., one of the largest outfits in the country, is now facing insolvency proceedings. This movement may result in the naming of one of the men connected with that organization as trustee or receiver. If there be any untoward results arising from such a receivership, this body will surely have to answer for it to the people of the country. The thing will smell to high heaven if they pursue the method so frequently pursued in cases of that kind. We might as well be advised now. If the Associated Gas & Electric Co. should get into trouble and there should be a scandal, I want Senators to remember what I say now on the floor of the Senate today, because I am going to remind them of it. This might easily project itself into a situation that would be a national scandal. We should allow the Government through its own agency to handle the matter if it reaches the stage of receivership.

"We had a Federal judge before us not long ago under impeachment proceedings and we have seen how tainted and corrupt some of these receivership matters may be. When a judge appoints a trustee or a receiver, he frequently names one of his own friends, and then he has a friend practicing law before him. There is not a lawyer in this body who has not seen that thing occur time after time. We almost impeached a Federal judge for doing that identical thing. He should have been impeached. I voted for his impeachment. I think a court ought to be in a class with Caesar's wife—above reproach, above suspicion—and some of our courts have not been above reproach or above suspicion. If there is any scandal connected with

this Associated Gas affair, Members of the United States Senate who voted to remove vital receivership control from the hands of the Commission are going to have to bear their share of the moral obloquy resulting from that proceeding, if the poor security holders are rooked, and we might have done something to prevent it, and did not."

Id. at 8943.